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LYNCH LAW AND ITS REMEDY.

It is said on newspaper authority that two hundred and seventeen persons were "lynched" in the United States during the year 1898; other statisticians of the press place the number much higher. The authority is not infallible, and there is room for doubt whether, in all cases, the term is used accurately or consistently, but, whatever may be the true figures, it is quite certain that many more persons met their death at the hands of lynchers than were legally executed, and equally clear that the frequency and impunity of lynchings throughout the Union is a serious and disquieting symptom of American society. It cannot be said that there is any failure among the organs of public opinion to admit or appreciate the last mentioned fact; the pulpit and press have vied in vehement denunciation of lynching, and the misdeeds of lynchers, and of their real or supposed apologists, have furnished the subject matter for great outcry to philanthropists and humanitarians; but as yet this zeal has not been very fruitful of good, and we may reasonably question whether it has always been according to knowledge. This fact was somewhat strikingly illustrated in this State[1] last summer. A negro was imprisoned in the county jail at Annapolis accused of several grave and revolting crimes, none of which, however, were capital.[2] The jailor was called to the door one night and immediately deprived of his keys by a band of armed and masked men, who

[1] Maryland.

[2] According to the statement of the newspapers at the time of his arrest, he could probably have been convicted of two assaults (on different white women) with intent to commit rape, of burglary and of larceny.

had silently surrounded it. The prisoner was hurried from his cell, but broke away from his captors at the door of the jail and fled through the town, shrieking for help and pursued by a fusilade of revolver shots. In a few moments he was killed, whereupon the lynching party immediately dispersed, leaving his body in the street, no one having in the least interfered with them, and the police being, or professing to be, in complete ignorance of the whole occurrence. One of the Baltimore newspapers attempted to obtain "interviews" from more or less prominent citizens condemning the outrage; but the result was very unsatisfactory, several of those approached thinking it an excusable, and two or three a very laudable, proceeding. The Governor proposed to offer a very moderate reward for the detection of the lynchers, if the Commissioners of the County would bear half the expense; but these officers refused peremptorily to contribute a cent for the purpose; no attempt has been made to prosecute any one for the offense, and the guilty parties are said to be well-known, and regarded by their neighbors as deserving only praise and respect for their public spirit and love of justice.

No argument is needed to prove that occurrences like this are regrettable, or that there is something wrong about a community which tolerates them; but to find a remedy one must first study the disease; if we would put an end to lynchings, we should try to understand their true nature and cause or causes; ignorant discussion, however earnest, can but darken counsel.

We must, in the first place, distinguish "lynch law" from mere disorder and from violence or terrorism in political or trade controversies. A lynching is not a riot, although it may lead to one: the Kuklux Klan and Mollie Maguires were not lynchers, nor were the striking miners at Pana and Virden, or the champions of "white supremacy" in North Carolina. The means of action employed in these various forms of lawlessness are indeed common to all of them and to lynching, but their ends differ as widely from its end as from each other. On the other hand, there is a close analogy between lynching and the action of "vigilance committees," "regulators" and "whitecaps': it is the *suprema ratio* to their milder methods of persuasion. The underlying purpose in all these cases is not to violate, but to vindicate, the law; or, to speak more accurately, the law is violated in form that it may be vindicated in substance, its "adjective" part (*i. e.*, matter of procedure) is disregarded that its "substantiative" part may be preserved. To illustrate: The law declares that a man who has slain another with malice

prepense shall be himself slain; it also declares that no man shall be punished until his guilt has been established beyond a reasonable doubt to the satisfaction of a unanimous jury of his peers. Lynchers know (or think they know) of a man who has committed a wilful, deliberate, malicious homicide, but they also know or believe that if he is tried he will be falsely pronounced innocent; the law must then be defeated in one way or the other; either a murderer must live, or one guilty, but not legally convicted, of murder must be slain; they choose the second alternative.

In this connection it is well to remember that, as Sir Henry Main has pointed out, in a primitive society the growth of criminal law is retarded by the very distinctness with which the conception of crime as a wrong to the community is realized. At first the State deals with its internal as with its external enemies by the immediate exercise of its military strength, and every sentence is less a judgment than a bill of attainder. It is only when the State has come to mean rather an abstract entity than you and me and all of us, or when it has been personified in some individual sovereign, that the question whether a prisoner is guilty of an offense against society becomes overshadowed by the question whether he can be convicted of the particular charge against him under the law and the evidence, and a criminal proceeding is converted from a vindication of the community's safety and dignity into a trial of skill between the government and the traverser, adapted especially to determine whether the latter has committed the Spartan's unpardonable fault of being found out.

Among us, popular government has caused a revival of the primitively vivid conception of crime as a wrong to society, to society viewed, not as a creation of the mind, but as simply an aggregate of its members. Some of these members know or believe that they (together with all others) have been so wronged; they only see to it that the wrong receives its appropriate punishment. They believe and act on the belief that, as the law is made by all, it is the business of all to aid in its enforcement. It is not the king's peace, but the people's peace which is here broken by crime, and so it is not the king's concern, but the concern of the whole community to guard against or punish the breach.

It is true that they dispense with any technical trial or formal proof of guilt, but in so doing they are justified by very ancient authority. Thus Bracton says:

"Apellatus" (that is, one accused of crime[3] "per corpus suum" (i. e. by wager of battel) "se defendere poterit cum appellatus fuerit, nisi aliqua violenta praesumptio faciat contra ipsum quæ probationem non admittit in contrarium per quam dedicere vel defendere posset mortem et feloniam: sicut esse potest cum quis captus fuerit super mortuum cum cultello cruentato: mortem dedicere non poterit: et haec est constitutio antiqua inquo casu non est opus alia probatione: in quo casu non est necesse probare pro corpus nec per patriam" (i.e. by a jury) "ubi præsumptio violenta facit contra appellatum."

When this passage was quoted *arguendo* by Chitty in the celebrated case of Ashford vs. Thornton,[4] Lord Ellenborough interrupted him to say:

"So that if a man were found over a dead body with a bloody knife in his hand it would, according to Bracton, be impossible for him to deny that he was the cause of the death, and he would be immediately condemned and executed."

In other words, in the case supposed, he was "lynched" without more ado. As is said in Staumford's Pleas of the Crown[5]:

"It appears by Bracton and Britton that in ancient times some of these presumptions were so vehement that they were as condemnation to the other party without any other trial."

Indeed one function of the judges in those early days seems to have been to determine whether the prisoner should be tried or lynched. Mr. Chitty in the case already referred, after quoting from Glanville,[6] Fleta[7] and Britton,[8] as well as Bracton, says further:

"From the above passages it would seem that in some cases of violent presumption the justices had a power to order execution '*nisi forte perspexerint veritatem per patriam debere inquiri.*'"

And Abbot, J., says in his opinion,[9] in deciding that the facts disclosed by the counter plea and replication in that case did not involve so strong a presumption of guilt as to deprive the prisoner of his right to defend by wager of battel:

"The presumption must be strong and vehement so as not to admit of denial or proof the contrary. It must be so strong, vehement and incapable of contradiction that the court might be warranted *in awarding execution thereon.*"

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[3] To be strictly accurate,—the appellee in an appeal of felony or of death.

[4] Barnwall & Alderson, pp. 427, 428.

[5] Chapter 15, p 178.

[6] Who wrote A. D. 1154.

[7] Who wrote A. D. 1272.

[8] Who wrote A. D. 1300.

[9] 1 B. & Al., p. 459.

In such a case "execution" would mean, of course, capital punishment.

It may be here noted that Bracton gives, in the course of this discussion, a reason for not referring to a jury certain obscure and mysterious cases of homicide which sounds strangely to a criminal lawyer of to-day accustomed to secure nine acquittals out of ten, not by proof of innocence, but through the prosecutor's failure to clearly prove guilt. The old author asks:

"Cum patria[10] veritatem scire non possit de tam occulto facto qualiter liberabitur ille qui superpatriam se posuerit?"

That is to say, his "true deliverance" (in the words of the juror's oath) depended on his satisfying the latter of his actual innocence.

It must be admitted, however, that lynchers do not in all cases purpose to enforce the law *as it is now;* they not infrequently have in mind its application as, in their view, *it ought to be* and, we add, in many cases, *as it was* until diluted by modern philanthropy. I have noted that the negro lynched in Annapolis could not have been convicted of any capital crime; to this fact the lynching very probably was due. In this respect lynching may be regarded as an exhibition of social atavism. The most obvious way to deal with a bad man is to get rid of him altogether by death or exile, and this system naturally commends itself to primitive communities. In all early societies we find an enormously long list of capital crimes, and beside these, a great number of punishments which are capital in everything but name. A man is killed no less effectually if you cut off his hands or put out his eyes and then make no provision for his support than if you cut off his head, nor is it a less effective, although a less economical and less humane, method of disposing of him, to send him to a distant place of banishment or to a foul and infected prison under conditions which make it reasonably certain that he will die of typhus fever very soon. Moreover, in the early history of most nations, some form of exile is a favorite punishment for offenses which the moral sense of the times does not deem worthy of death. Aristides had to be ostracised because he was so alarmingly and offensively respectable.

There is more to be said in favor of this plan, both theoretically and practically, than some of us are ready to admit. It is eminently scientific; those who adopt it deal with the crim-

[10] That is to say, a jury.

inal just as we are taught to deal with glandered horses or cows suffering from pleuro-pneumonia; and, although I am not aware that the bacillus of homicide or the microbe of larceny has yet been isolated, I have seen a good deal written about crime as a disease, and, if it is a disease, it is certainly both dangerous and contagious. But, what seems to my mind more important is that our forefathers preserved an endurable degree of security for life and property without penitentiaries and almost without police; and this was due, in no small measure, to the fact that among them, that product of modern enlightenment, the professional criminal, was hardly known. It was scarcely credible that a man could be convicted of several serious offenses successively, when, if he was not, as he probably would be, hung for the first, he was practically certain to contract some one of the maladies then endemic in prisons before he could be tried for the second. As a mere deterrent to crime, capital punishment, whether inflicted openly or covertly, is probably the best penalty known, and it has also the serious, although now generally underrated, advantage of affording a legitimate outlet for the instinctive hostility of the race towards its natural enemies. When a man of ordinary conscience and feeling hears of a gross violation of right, he feels a strong itching to "get at" the perpetrator, and if lawyers or politicians or humanitarians, or all three combined, balk him of a reasonable satisfaction to this craving within the limits of the law, he will soon be found loading up his shot gun with slugs or invoking the jurisdiction of Judge Lynch. On other hand, if the offense does not seem to Mr. Lincoln's "plain people" sufficiently serious to deserve death, but the perpetrator is a notoriously undesirable member of society, a vigilance committee will "assist" him to a change of abode much as the Athenians did those statesmen too eminent for the public safety.

In dealing with these questions it is a grave error to overlook that innate hatred of wrong-doing and of guilty men, to which I have above alluded, and which is an essential element in every healthy human mind; yet this is often done. In the numerous discussions which arose among philanthropists and physicians as to the merits of execution by electricity when this was first attempted, it was invariably assumed that to obtain the minimum of suffering for the criminal put to death was necessarily a good thing. Two or three hundred years ago just the contrary would have been thought by all thoughtful men. Rulers and law-makers of those days wished and tried

to make executions painful, partly, no doubt, because they supposed that this would tend the more securely to prevent crime, but in great measure because of the grim pleasure it gave them to insure a bad time for bad people. We must not suppose human nature changed because those times are past; the instinct which prompted such sentiments and such laws, though fortunately tamed and chastened, is, yet more fortunately, not dead, and it must be allowed a vent within the law, or, as I have already suggested, it will prove too strong for the law.[11]

Nor must we forget that after all, the end of punishment is to punish. A prison should not be a hell, but it fails of its purpose if it is too pleasant for a purgatory. In a very interesting paper read at one of the meetings of the Prison Congress I once found some well-reasoned remarks upon the moralizing and reformatory influence of a good diet. To recognize their force, one need not be an expert in penology; there are few indeed who feel as virtuous when hungry as after eating enough, and not too much, of what agrees with them. But is it just or consistent to tell a man: "Thou shalt not steal, even to get thy dinner," and, after and because he has stolen, to see that he always has a good dinner? Is it right for the taxpayers to feed a rascal to the limit of his appetite, while so many honest men go every night supperless to bed. Does this tend to make vice odious, or to breed reverence for the law?

It is even more important to remember that there are some men whom no form of penal discipline will ever make estimable or useful, or even harmless. Their number is doubtless far less than we might suppose at first sight, but such men exist and we must provide for them. A time must come when, in justice to its worthier members, society is bound to no longer endure a being at once loathsome, dangerous, costly and corrupting. It is a defiance of common sense and a caricature of charity when a man who has passed most of his life in one prison or another for offenses involving great suffering to innocent people, vast injury to the vital interests of society and profound moral turpitude, is let loose again to do once more what he has already so often done and been fruitlessly punished for doing. A community which tolerates an abuse so absurd and shameful is an accomplice in the crimes which only its laziness and folly render possible. Lynching is an attempt to supply within the

[11] This fact has been forcibly illustrated by the recent and really shocking case of lynching in Georgia; a case in which the brutality of the crime and the barbarity of the retribution are almost equally revolting.

unquestioned province of the government the government's equally unquestioned deficiency, and its practice constitutes a grave proof of the evil it seeks to remedy. If popular government does not so administer justice as to satisfy the moral sense of the people, then popular government fails to fulfil its duty.

To get rid of Judge Lynch I propose, therefore, three classes of reforms in criminal law, intended:

First. To increase the number of capital crimes so as to ensure the extirpation of the habitual criminal. When a man has been covicted, say twice, of serious offenses, of felonies or of such misdemeanors as argue exceptionally great depravity or involve grave injury or danger to society, let him, on a third conviction for a like offense, be sentenced to death. He has had his chance for usefulness in this life; it is time to think, not so much of his past, but of his possible future, victims.

Second. To diminish the delays and uncertainties of criminal procedure in various ways: *inter alia* I would abolish grand juries, recruit petit juries among intelligent and well-informed, not stupid and ignorant, citizens, and, to that end, abrogate altogether the right of peremptory challenge and confine challenges for cause to grounds really reasonable; do away with the absurd notion that a man should not be "twice in jeopardy for the same offense," or, rather, that this rule (which is fair enough if rationally interpreted) prevents in any case an appeal by the State based on errors of law by the trial court; require the trial of a prisoner as soon after his arrest as allows time for the State to collect its evidence and for him to prepare his defense, without regard to terms of court or other technical impediments, and, most important perhaps of all, make certain that public prosecutors shall be lawyers chosen for character and competency, not politicians under obligations to the criminals they prosecute.

Third. To remove the pardoning power from executive and vest it in judicial officers, so that an application for its exercise shall constitute virtually an appeal against the rightfulness of the sentence, made without limitation of time, and upon any grounds which may seem to require it, *ex aequo et bono*, to be rescinded or modified.

I am aware that such suggestions will find little favor with a certain class of very estimable people whose misplaced, and, indeed, morbid, sympathy for evil-doers undoubtedly constitutes an impediment to the adoption of any rational system of dealing with these, but I do not think this impediment very serious.

To my mind the greatest, indeed the one great, obstacle to reform in our criminal laws is that so many persons who ought to be and often have been in prison are, not only out of prison, but actively, if not conspicuously, engaged in the government of the country. Among us a common Botany Bay is the lower end of the political arena: we reform (or further debauch) no small proportion of our convicts by making them our rulers. One who knows how much of the routine, but needful, work of our inferior politics is habitually done by our criminal classes, is not surprised that the interests, the wishes, the prejudices of these classes should receive respectful consideration at the hands of our Legislatures, if not of our courts. In this field, as elsewhere, he who would make things better is met at every turn by apathy, indifference and even hostility among those who hold power in our midst. To improve our courts and prisons, we must first of all change the men who establish and control them, and purify the customs and traditions which put these men where they are; in short, to reform our administration of justice, we must first and thoroughly reform our politics.

CHARLES J. BONAPARTE.